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No. 81-2401

In the Supreme Court of the United States

OCTOBER TERM, 1982

ULRICH WALDEMAR YOUNG, a minor, NORBERT NELSON YOUNG and CHARLOTTE MARIE YOUNG, GLENN O. YOUNG, in person and Administrator of the Estate of Thomas Alexander Young, and Father and next friend of Ulrich Waldemar Young and Norbert Nelson Young,
Petitioners,

v.

FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas; JAMES M. STURDIVANT, GABLE, GOTWALS, RUBEN, FOX, JOHNSON & BAKER, as Attorneys,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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August, 1982

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SUMMARY OF ARGUMENT

The decision below was in accord with the law governing federal court jurisdiction. Petitioners' assertion that Fidelity Union Life Insurance Company, Respondent, a Texas Company, must be regarded as a citizen of Oklahoma in an action on a contract for life insurance, thus creating an absence of federal jurisdiction, is premised on

an erroneous reading of the applicable statute and, therefore, is without merit. There is no question of law at issue that justifies the grant of a writ of certiorari.

ARGUMENT

This case involves a second attempt by the Petitioner Charlotte Young, and those in privity with her, to recover on a policy of life insurance issued by the Respondent, Fidelity Union Life Insurance Company (hereinafter "Fidelity"), to Thomas Alexander Young. The policy in question was issued on September 18, 1974 and lapsed for nonpayment of premiums on December 19, 1974. Thomas died on February 14, 1975, fifty-seven (57) days after the policy became of no force and effect.

In the first case, originally filed in the District Court in and for Creek County, Oklahoma and removed to the United States District Court for the Northern District of Oklahoma by reason of diversity, judgment was granted to Fidelity on a motion for summary judgment and affirmed by the Court of Appeals in *Young* v. *Fidelity Union Life Insurance Company*, 597 F.2d 705 (10th Cir. 1979). Thereafter, the Petitioners here sought to relitigate the issues already decided and affirmed by filing a second suit in the state court, adding as defendants Fidelity's Oklahoma attorneys. Upon removal, the United States District Court for the Northern District of Oklahoma dismissed the allegations against the attorney defendants on the grounds of fraudulent joinder and granted judgment for Fidelity on the basis of *res judicata*. The action of the District Court was affirmed by the Court of Appeals on March 23, 1982

and the opinion of that court is set forth in full in Appendix A to Petitioners' Petition for Writ of Certiorari on file herein.

The Petitioners now seek to have both decisions of the United States District Court for the Northern District of Oklahoma and both decision of the Tenth Circuit Court of Appeals set aside on the basis that neither of these courts at any time had jurisdiction to decide matters involving this particular policy of insurance and the rights of these parties. In support of this position, the Petitioners claim that Fidelity must, for the purposes of the litigation, be considered a citizen of Oklahoma and not a citizen of Texas, the state in which it is incorporated and has its principal place of business. Pursuing this theory, the Petitioners claim that the diversity of citizenship necessary for federal jurisdiction is lacking and that all prior decisions of the federal courts in this matter are void.

The assertion of lack of jurisdiction is clearly without merit as 28 U.S.C. § 1332 provides in pertinent part that:

> "(a) The District Court shall have original jurisdiction of all civil actions where the matter in controversy . . . is between:
>
> (a) citizens of different States:
>
> * * * *
>
> (c) For the purposes of this section and section 1441 of this title [28 USCS § 1441], a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: . . ."

Fidelity is a stock company, organized under the laws of Texas, with its principal office and place of business

located in Dallas, Texas. All of the Petitioners are residents of the State of Oklahoma. The only defendants who are also residents of Oklahoma were named in the second case. These were James M. Sturdivant and the law firm of Gable, Gotwals, Rubin, Fox, Johnson & Baker, the attorneys for Fidelity in the first case. The District Court found that the Oklahoma residents had been fraudulently joined and dismissed as to them. Petitioners do not appear to contest this ruling, "since Fidelity and its attorneys and plaintiffs were all, for the purposes of this suit, Oklahoma citizens, whether they were fraudulently joined or not was immaterial to the case." Petition. p. 4. Instead, Petitioners rely on that portion of 28 U.S.C. § 1441 which reads in pertinent part as follows:

> "Provided further, That in any direct action against *the insurer of a policy or contract of liability insurance* whether incorporated or unincorporated in which action the insured is not joined as a party-defendant, *such insurer shall be deemed a citizen of the state of which the insured is a citizen* as well as any state by which the insured has been incorporated and of the state where it has its principal place of business." (Emphasis added.)

The error of Petitioners' argument is patent. Liability insurance is "that form of insurance which indemnifies against liability on account of injuries to the person or property of another." *Black's Law Dictionary*, 723 (rev. 5th ed. 1979). The policy at issue in both the cases filed by Petitioners was a policy of life insurance. Life insurance is distinguishable from liability insurance, "being a contract between a holder of a policy and an insurance company . . . whereby the company agrees, in return for premium payments, to pay a specified sum to the designated beneficiary

upon the death of the insured." *Black's Law Dictionary,* 723 (rev. 5th ed. 1979).

Petitioners' assertion that there is a lack of diversity is, therefore, based on an erroneous reading of the controlling statutes, 28 U.S.C. §§ 1332, 1441.

CONCLUSION

It is respectfully submitted that the Petitioners have wholly failed to sustain their burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. The decisions below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided a federal question in a way to conflict with applicable decisions of this Court or of another Court of Appeals on the same matter. The Court of Appeals correctly held that the conclusion of law of the trial court respecting federal jurisdiction was not clearly erroneous.

Respectfully submitted,

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